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COMMITTEE ON THE ELIMINATION
OF RACIAL DISCRIMINATION
Fifty-sixth session
6-24 March 2000

OPINION

Communication No. 17/1999

Submitted by :	B.J. (represented by legal counsel)
Alleged victim:	The author
State Party:	Denmark
Date of communication:	13 July 1999 (initial submission)
Date of adoption of Committee's opinion:	17 March 2000

[See annex]

* Made public by decision of the Committee on the Elimination of Racial Discrimination.

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ANNEX

OPINION OF THE COMMITTEE ON THE ELIMINATION
OF RACIAL DISCRIMINATION

FIFTY-SIXTH SESSION

concerning

Communication No. 17/1999

Submitted by: B.J. (represented by legal counsel)

Alleged victim: The author

State party concerned: Denmark

Date of communication: 13 July 1999 (initial submission)

The Committee on the Elimination of Racial Discrimination, established under article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination,

Meeting on 17 March 2000,

Having concluded its consideration of communication No. 17/1999, submitted to the Committee under article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination,

Having taken into consideration all written information made available to it by the author and the State party,

Bearing in mind rule 95 of its rules of procedure requiring it to formulate its opinion on the communication before it,

Adopts the following:

OPINION

1.1 The author of the communication is Mr. B.J., a Danish engineer of Iranian origin born in 1965 who claims to be a victim of violations by Denmark of article 2, subparagraph 1 (a), (b) and (d), article 5 (f) and article 6 of the Convention. He is represented by counsel.

1.2 In conformity with article 14, paragraph 6 (a), of the Convention, the Committee transmitted the communication to the State party on 27 August 1999.

The facts as submitted by the author

2.1 The author has lived in Denmark since 1984 and has Danish nationality. On 1 February 1997 he went to a discotheque in Odense with his brother and a group of friends. Two of them were of Danish origin and four were not. The doorman of the discotheque, Mr. M.R.S., refused to let them in. When the author asked the reason Mr. M.R.S. replied that it was because they were "foreigners".

2.2 On 2 February 1997 the author reported the matter to the police, complaining of racial discrimination. The police assistant on duty was unwilling to accept the complaint and informed the author that the admissions policy was entirely up to the owners of the discotheque.

2.3 On 3 February 1997 the author filed a written complaint that was rejected by the police. He then appealed to the State Attorney who decided to initiate an investigation. Subsequently, the Public Prosecutor brought the case before the District Court of Odense. By decision of 20 March 1998 the Court ruled that Mr. M.R.S. was to be fined DKK 1,000 for violation of section 1, subparagraph 2, of Consolidated Act No. 626 of 29 September 1987 on racial discrimination.

2.4 The author had also requested the Public Prosecutor to file a claim for compensation in accordance with section 26 of the Act on Civil Liability. In that respect the court decided that the violation to which the author had been subjected was not of such a grave or humiliating character as to justify the granting of pecuniary compensation. Accordingly, the claim was rejected.

2.5 The author did not receive a copy of the court's judgement until the time-limit for filing an appeal to the High Court had expired. With the assistance of the Documentary and Advisory Centre on Racial Discrimination (DRC) he obtained a special permit from the High Court of the Eastern Circuit to bring the case before it. However, the High Court did not find any basis for a claim of compensation. According to its judgement, the doorman had informed the author and his friends that they could not enter the discotheque because, in accordance with the discotheque's rules, there were already more than 10 foreigners inside. That information was first given to the author's brother and then to the author himself in a polite manner. In the circumstances the High Court concluded that the violation of the author's honour committed by the doorman was not of such severity and did not involve such humiliation as to justify the granting of compensation under section 26 of the Act on Civil Liability. The Court made reference to the fact that the doorman had been fined for rejecting the author and that, accordingly, the necessary verification and condemnation of the act had taken place and the author had had sufficient satisfaction.

2.6 Judgements of the High Court in appeal cases may normally not be appealed to the Supreme Court. However, the Procesbevillingsnaevn may grant a special permit if the case involves issues of principle. On 4 March 1999 the author's counsel applied to the Procesbevillingsnaevn for such a permit, arguing that Danish courts had never before had the possibility to interpret section 26 of the Act on Civil Liability in the light of article 6 of the Convention. The application, however, was rejected by letter of 11 May 1999 and the case was not brought before the Supreme Court. No further remedies are available under Danish law.

The complaint

3.1 According to counsel, it is undisputed that the author's exclusion from the discotheque was an act of racial discrimination. Article 6 of the Convention stipulates that effective satisfaction and reparation must be granted for any damage suffered as a result of discrimination. However, the purely symbolic fine imposed by the Odense court does not provide effective satisfaction or reparation in accordance with that provision. Furthermore, under section 26 of the Danish Act on Civil Liability it is possible to grant compensation for insult. By refusing such compensation the Danish courts have failed to apply Danish law.

3.2 Counsel further claims that by refusing the author's right to compensation the Danish courts have not fulfilled their obligations under article 2, subparagraph 1 (a), (b) and (d), of the Convention. He finally claims that by allowing the discotheque to refuse the author access on racial grounds the State party has not fulfilled its obligations under article 5 (f) of the Convention.

State party's observations

4.1 In a submission dated 29 November 1999 the State party recognizes that the conditions for admissibility of the communication are satisfied. However, it claims that no violation of the Convention has occurred and that the communication is manifestly ill-founded.

4.2 The State party recalls that, by indictment of 3 June 1997, the Chief Constable of Odense charged the doorman in question with violation of section 1 (2) of the Act Prohibiting Discrimination on the basis of Race (Consolidated Act No. 626 of 29 September 1987), because on 2 February 1997 he refused the author admittance on the basis of the latter's colour and ethnic origin. On 20 March 1998 the District Court of Odense found the doorman guilty of the charge. Upon counsel's request, the prosecutor claimed that the doorman should pay compensation for non-pecuniary damage to the author, in accordance with section 26 of the Act on Liability in Damages (erstatningsansvarsloven) and article 6 of the Convention. However, the claim for compensation was dismissed by the District Court. The author filed an appeal with the Eastern High Court claiming that the offender should be ordered to pay compensation for non-pecuniary damage of DKK 10,000 with the addition of pre-judgement interest. However, the Eastern High Court upheld the judgement of the District Court.

4.3 In connection with the alleged violation of article 2 (1) (a), (b) and (d) of the Convention, the State party argues that article 2 (1) (d) is the most relevant provision, as article 2 (1) (a) and (b) do not make any independent contribution in relation to the author's complaint, which concerns discrimination committed by a private individual. The adoption of Consolidated Act No. 626 of 29 June 1987 prohibiting discrimination on the basis of race is to be seen, inter alia, as fulfilment of the obligations following from articles 2 (1) (d), 5 (f) and 6 of the Convention. Not only has the State party adopted a law that criminalizes acts of racial discrimination such as that of which the applicant was a victim on 2 February 1997, but Danish authorities have enforced these criminal provisions in the specific case by prosecuting and penalizing the doorman.

4.4 Concerning the author's claim that the purely symbolic nature of the fine does not provide effective satisfaction or reparation, the State party claims that the Convention cannot be interpreted to mean that it requires a specific form of penalty (such as imprisonment or a fine) or a specific severity or length (such as a non-suspended custodial penalty, a suspended custodial penalty, a fine of a specific amount or the like) as the sanction for specific types of acts of racial discrimination. In the State party's view, it is not possible to infer a requirement of a penalty of a specific type or severity from the wording of the Convention, the practice of the Committee in its consideration of communications under article 14, or from the general recommendations adopted by the Committee.

4.5 Violations of section 1 of the Act prohibiting discrimination on the basis of race are punished with "a fine, lenient imprisonment or imprisonment for a term not exceeding six months". In determining the penalty within the maximum penalty provided for by the provision, the court in question must take into account a multiplicity of elements. It thus follows from section 80 (1) of the Danish Criminal Code that, in determining the penalty, account shall be taken of the gravity of the offence and information concerning the offender's character, including his general personal and social circumstances, his conduct before and after the offence and his motives in committing it.

4.6 Determination of suitable sanctions in specific cases falls within the margin of appreciation of the State party. The national authorities have the benefit of direct contact with all the persons concerned and are better able to assess what is a suitable sanction in the specific case. Moreover, it must be up to the State party to decide what sanction must be deemed sufficiently deterrent and punitive. It is recognized, however, that the margin of appreciation should not be exercised in a manner which would impair the very essence of article 6 of the Convention.

4.7 The penalty imposed on the doorman in the present case accords with domestic case law in similar cases and can be compared with the sanctions in criminal cases concerning racist statements falling within section 266b of the Criminal Code.[1] It can therefore not be considered a fine of a "purely symbolic nature".

4.8 In view of the foregoing, the State party is of the opinion that there is no basis for alleging that article 2 (1) (d), article 5 (f) or article 6 of the Convention has been violated by the conduct of the criminal proceedings against the doorman, as the judgement established that the author had been the victim of a prohibited act of racial discrimination.

4.9 An individual who believes that he or she has been the subject of discrimination in violation of the Act prohibiting discrimination on the basis of race, interpreted in the light of the Convention, can, if relevant, claim compensation for pecuniary or non-pecuniary damage from the offender. However, the State party finds that it must be left to the individual State party to determine the detailed procedural rules and rules of substance for awarding compensation for non-pecuniary damage.

4.10 The right to "adequate reparation or satisfaction" is not an absolute right, but may be subject to limitations. These limitations are permitted by implication since such a right, by its very nature, calls for regulation by the State. In this respect, the States parties enjoy a margin of

appreciation and can lay down limitations provided that those limitations do not restrict or reduce the right in such a way or to such extent that its very essence is impaired. In this respect guidance may be found in the jurisprudence of the European Court of Human Rights.

4.11 The State party finds that the last part of article 6 of the Convention is to be interpreted in the same way as article 5 (5) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It appears from the latter that everyone who has been the victim of arrest or detention in contravention of its provisions "shall have an enforceable right to compensation". In the interpretation of this provision the European Court has established that the provision does not involve an unconditional right to compensation, as the Contracting States have a right to demand that certain conditions be satisfied. Thus, the Court has stated that the said provision "does not prohibit the Contracting States from making the award of compensation dependent upon the ability of the person concerned to show damage resulting from the breach. In the context of article 5 (5) ... there can be no question of 'compensation' where there is no pecuniary or non-pecuniary damage to compensate".[2]

4.12 It is thus the opinion of the State party that the Convention cannot be interpreted to mean that a person who has been the subject of an act of discrimination committed by another individual, including an act of discrimination in violation of article 5 (f) of the Convention, always has a claim for compensation for non-pecuniary damage. The fact that a person who has committed such an act is actually prosecuted and convicted can in certain cases constitute in itself "adequate reparation or satisfaction". This view is supported, inter alia, by the interpretative statement concerning article 6 of the Convention deposited by the United Kingdom when signing the Convention. The statement in question says: "The United Kingdom interprets the requirement in article 6 concerning 'reparation or satisfaction' as being fulfilled if one or other of these forms of redress is made available and interprets 'satisfaction' as including any form of redress effective to bring the discriminatory conduct to an end."

4.13 According to Danish law, it is possible both in law and in fact to be awarded compensation for pecuniary and non-pecuniary damage in case of acts of racial discrimination committed by individuals in violation of the Convention, but this presupposes that the conditions therefor are otherwise satisfied.

4.14 Pursuant to section 26 (1) of the Act on Liability in Damages, a person who is responsible for unlawful interference with another person's liberty, invasion of his privacy, damage to his self-esteem or character or injury to his person shall pay compensation for the damage to the injured person. The provision is mandatory but the condition is that the unlawful act has inflicted "damage" (in Danish tort) on the injured party. Tort in the Danish sense is damage to another person's self-esteem and character, that is, the injured person's perception of his own worth and reputation. The humiliation is what motivates the claim for compensation for non-pecuniary damage. It is inherent in the requirement of "unlawful" damage that it must be culpable and that it must be of some gravity. When determining the compensation, if any, account must be taken of the gravity of the damage, the nature of the act and the circumstances in general.

4.15 The decision of the Eastern High Court refusing compensation to the author for non-pecuniary damage was based on a specific assessment of the circumstances concerning the criminal act. Thus, the Court found that the damage to the author's self-esteem had not been sufficiently grave or humiliating to determine any compensation for non-pecuniary damage.

4.16 The fact that a person who has committed an act of racial discrimination against another individual is actually prosecuted and convicted can in certain cases constitute in itself "adequate reparation or satisfaction". The judgement of the Eastern High Court accords with this view when it states the following: "The Court further refers to the facts that the doorman has been sentenced to a fine in respect of the refusal of admittance, that the requisite determination and condemnation of the act has thus been effected and that this has afforded the applicant sufficient satisfaction."

4.17 It is thus the opinion of the State party in the specific case that the fact that the doorman was sentenced to a fine for his refusal to admit the author to the discotheque in question constitutes "adequate reparation or satisfaction".

Counsel's comments

5.1 In a submission dated 14 January 2000 counsel maintains that no effective remedy has been granted to the author in order to comply with the relevant provisions of the Convention, including article 6. In order to implement the Convention conscientiously the States parties must be under an obligation to ensure its effective observance. Sanctions for breaches of national provisions implementing the Convention must be effective and not only symbolic.

5.2 The State party argues that under Danish law it is possible to be awarded compensation for pecuniary and non-pecuniary damage in case of acts of racial discrimination in violation of the Convention committed by individuals, but this predisposes that the conditions therefor are otherwise satisfied. To counsel's knowledge no such court decisions exist. The present case was the first in which a claim for compensation was examined by a Danish court.

5.3 Furthermore, according to section 26 of the Danish Act on Liability compensation is granted in accordance with other statutory provisions. As no other statutory provisions exist in this field there would be no point in awaiting coming court decisions.

5.4 The decision to refuse compensation implies, as a matter of fact, that no compensation for non-pecuniary damages is granted in cases of racial discrimination if the racial discrimination has taken place "politely". Such a position is not in conformity with the Convention.

Issues and proceedings before the Committee

6.1 As readily recognized by the State party the Committee considers that the conditions for admissibility are satisfied. It therefore decides, under rule 91 of its rules of procedure, that the communication is admissible.

6.2 The Committee considers that the conviction and punishment of the perpetrator of a criminal act and the order to pay economic compensation to the victim are legal sanctions with different functions and purposes. The victim is not necessarily entitled to compensation in addition to the criminal sanction of the perpetrator under all circumstances. However, in accordance with article 6 of the Convention, the victim's claim for compensation has to be considered in every case, including those cases where no bodily harm has been inflicted but where the victim has suffered humiliation, defamation or other attack against his/her reputation and self-esteem.

6.3 Being refused access to a place of service intended for the use of the general public solely on the ground of a person's national or ethnic background is a humiliating experience which, in the opinion of the Committee, may merit economic compensation and cannot always be adequately repaired or satisfied by merely imposing a criminal sanction on the perpetrator.

7. While the Committee considers that the facts described in the present communication disclose no violation of article 6 of the Convention by the State party, the Committee recommends that the State party take the measures necessary to ensure that the victims of racial discrimination seeking just and adequate reparation or satisfaction in accordance with article 6 of the Convention, including economic compensation, will have their claims considered with due respect for situations where the discrimination has not resulted in any physical damage but humiliation or similar suffering.

Notes

[1] The State party refers to several cases which are also mentioned in the fourteenth periodic report of Denmark before CERD.

[2] Wassink v. the Netherlands, judgement of 27 September 1990.

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